

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERAME DURELL CROWE,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 250147

Wayne Circuit Court

LC No. 03-003590-01

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to seven months to five years' imprisonment for the felon in possession conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first alleges that several remarks made by the prosecutor during opening and closing argument constitute prosecutorial misconduct and require reversal. We disagree. This Court examines claims of prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, "[a]ppellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 614 NW2d 370 (2000), abrogated in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). To satisfy the plain error test set forth in *Carines*, *supra*, a defendant must show that:

1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), quoting *Carines*, *supra* at 763.]

Additionally, the defendant must establish either that the error resulted in the conviction of an actually innocent defendant or that the error seriously impacted the fairness, integrity or public reputation of judicial proceedings. *Id.*

The first step under this test is to determine whether error occurred. *Id.* A reviewing court must consider claims of prosecutorial misconduct on a case by case basis by examining the record and evaluating the remarks in context. *Schutte, supra* at 721. “Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *Id.* A prosecutor may argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). During closing argument, a prosecutor is free to comment on the witnesses’ credibility in light of the evidence. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). He may use emotional language. *Ackerman, supra* at 454. The prosecutor’s comments must be considered in light of the arguments raised by the defense, and an otherwise improper remark does not require reversal when the prosecutor is responding to the defense counsel’s argument. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001).

Specifically, defendant contends that the prosecutor committed misconduct by: (1) referencing the fact that defendant was placed in handcuffs for safety purposes, but his mother who was present in the apartment was not handcuffed; (2) referencing the fact that defendant was to be taken to the Taylor Police Department; (3) referencing improper other acts evidence by advising the jury that the gun found in the hamper was loaded and untraceable because the serial number was destroyed; and (4) improperly vouching for the credibility of the prosecution witnesses by stating, in closing, that defendant had possession of the gun and the police were not lying.

After reviewing the entire record, we conclude that prosecutorial misconduct did not occur. Rather, the prosecutor provided a foundation for the charges by presentation of the underlying factual circumstances and responding to the issues raised by the defense. The prosecutor notified the jury of the restrictions on freedom of movement by the defendant and his mother in order to demonstrate the location of the gun and its proximity to the defendant’s bedroom. This information was utilized to establish possession and negate any contention that the gun was moved. The prosecutor also notified the jury that defendant was being transported to the jail in order to provide the foundation for the officers’ need to locate clothing for defendant. The prosecutor’s introduction of the condition of the gun was merely foundational and was not utilized as a prior bad act. Moreover, the defense did not object to this evidence, and appellate review of bad acts evidence can be waived where the defense fails to timely object, stipulates to admission, or voluntarily injects the issue. See *People v Yarger*, 193 Mich App 532, 530; 485 NW2d 119 (1992). Lastly, the prosecutor’s reference to the truthfulness of the testimony of his witnesses was responsive to the defense contention that the police were liars.¹

¹ We note that defense counsel was the sole individual who provided a basis for defendant to be taken into custody aside from the charges at issue. The defense notified the jury that the police were investigating computer fraud. He stated that a woman allegedly had wrongfully utilized personal information of others to obtain credit cards and make purchases. It was suspected that the orders were placed by a woman in apartment seven, but were mailed to apartment fifteen, the residence of defendant and his mother. Defendant’s sister resided in apartment seven. Thus, the defense injected a basis for the jury to conclude that there was a reason to take defendant into custody, regardless of the discovery of the gun. Additionally, the defense, in opening argument,

(continued...)

Accordingly, we cannot conclude that the prosecutor's argument was erroneous or that plain error requiring reversal was established.

Defendant next alleges that a new trial is warranted where police witnesses referred to other criminal acts by defendant. We disagree. "A trial court's decision to admit evidence is reviewed for an abuse of discretion." *People v Coy*, 258 Mich App 1, 3; 669 NW2d 831 (2003). Where a claim of error is unpreserved, however, this Court reviews only for plain error that affects a substantial right. *Schutte, supra* at 721.

"[N]ot every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, 'an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.'" *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999) (citation omitted). "However, when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense. Police witnesses have a special obligation not to venture into such forbidden areas." *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983) (citations omitted).

Specifically, defendant contends that police improperly injected: (1) evidence that defendant had been under surveillance during the summer, to advise the jury that defendant had long been suspected of criminal behavior; (2) evidence that defendant's mother was afraid of him; and (3) evidence of the t-shirt that defendant was wearing during trial in comparison with the t-shirt that was wrapped around the gun. Based on this record, we cannot conclude that the admission of this evidence constituted an abuse of discretion. *Coy, supra*.

At trial, the federal agent testified regarding his belief that the t-shirt that was wrapped around the gun belonged to defendant. Following an objection by the defense, the trial court advised this witness to answer questions based on personal knowledge. The federal agent then began to testify regarding surveillance of defendant in the summer. The prosecutor interjected before the federal agent could complete his statement and changed the subject. This brief, inadvertent reference does not provide defendant any relief, particularly when it was defense counsel who in opening argument, elicited the information regarding the computer fraud and its connection to defendant's apartment.

The statement by the federal agent addressing his belief of the fear held by defendant's mother also does not provide a basis for relief. A party cannot claim error requiring reversal based on a ruling to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich

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repeatedly advised the jury that the police were "liars," and the federal investigator would tell the jury "three lies ... lies, not mistakes, intentional falsehoods." Under these circumstances, defendant cannot complain of error. *Yarger, supra*. In any event, the trial court instructed the jury that the attorneys' statements are not evidence, thereby dispelling any prejudice. *Schutte, supra* at 720-721. The prosecutor's statements, therefore, would not require reversal, even if improper.

App 212, 224; 663 NW2d 499 (2003). Moreover, a party may not acquiesce to the trial court's handling of an issue only to claim error on appeal. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). After the witness testified regarding his belief of the mother's fear, the defense moved to strike the statement. The prosecutor agreed to strike the portion of the statement regarding fear as speculative. The defense proceeded to ask the trial court to admonish the witness, then retracted this request, stating "It's not that important." Accordingly, the trial court did not take any corrective action in light of the parties' agreement regarding the portion of the testimony that was proper. Accordingly, defendant cannot harbor error as an appellate parachute and seek relief before this Court. *Id.*

Lastly, the admission of the opinion evidence that defendant was wearing a t-shirt to court that resembled the t-shirt found wrapped around the gun was not an abuse of discretion. *Coy, supra*. The prosecutor's line of questioning into whether defendant was wearing a t-shirt similar to the one in which the gun was found has some tendency to make it more likely that the t-shirt found in the hamper in his apartment, as well as the gun, belonged to him and is, therefore, relevant. MRE 401. Moreover, the defense was able to elicit testimony that the t-shirt worn to court and the t-shirt found in the hamper were different sizes, and the witness could not distinguish t-shirts made by different manufacturers. The trial court did not abuse its discretion in allowing this line of questioning.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood